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No. 88-826

IN THE

Supreme Court of the United States

October Term, 1988

DONALD KELSEY, *et al.*,

Petitioners,

vs.

MUSKIN, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

(1) Whether certiorari should be granted where every circuit court has found no private action for violation of the Consumer Product Safety Commission reporting rules and the court below chose not to decide the question?

(2) Whether a federal, common law definition of the causation element in a Consumer Product Safety Act case would or should change the result below?

(3) Whether several respondents that admittedly have no direct connection to the product involved should nonetheless be subjected to further proceedings?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Donald Kelsey, David Kelsey, and Kathy Kelsey [hereinafter collectively referred to as the "petitioners"] have petitioned for a writ of certiorari to review a unanimous decision of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Northern District of New York. The petition should be denied by this Court.

This brief demonstrates that certiorari is not warranted in this case because 1) there is no split among the various federal circuits, and in fact, every federal court of appeals considering the issue of a private right of action has held contrary to petitioners' arguments; 2) a federal common law of causation would not alter the outcome of this case; and 3) liability is lacking against some of the named respondents, but particularly National Spa and Pool Institute, as to whom there is no connection to the product involved.[1]

[1] National Spa and Pool Institute, a respondent, is a not-for-profit Illinois corporation doing business as a trade association for the swimming pool, spa, and hot tub industry. National Spa and Pool Institute has no parent, subsidiary, or affiliated corporations. *See* U.S. Sup. Ct. Rule 28.1.

Statement of the Case

There is no proof that the swimming pool industry represented that diving from the railing above an adjacent house deck was a safe way to enter any body of water. More importantly, there is nothing in this record to suggest that an individual with a blood alcohol content of 0.20 percent could even locate, much less read, a conspicuous warning from eight feet above the pool. Whether Congress intended to reward such cavalier conduct is not the issue presented by this case.

Although the petitioners admit that the existence of a private right of action was not decided below, they nonetheless urge that some perceived conflict over this issue is a proper basis for issuance of the writ. *Compare* Brief for Petitioner at 13 *with* Brief for Petitioner at 14-28. In actuality, there is no conflict among the federal circuit courts considering this issue. Thus, the petitioners' primary argument is baseless, and moreover, is irrelevant to this Court's consideration because the Second Circuit decided this case on other grounds.

This case concerns causation, not the existence of a private action under the Consumer Product Safety Act, 15 U.S.C. §2051 (1982) [hereinafter referred to as the "CPSA"]. In the district court and in the Second Circuit, there was no need to consider whether a private remedy was afforded by the CPSA because this case was easily decided on other grounds. According to the petitioners, these grounds should be ignored. Whether the CPSA even applies to a trade association should be ignored. The fact that the pool was installed several years before the CPSA was enacted should be ignored according to the petitioners. These matters were not ignored by the lower courts and the sound judgment below should not be needlessly questioned. The petition should be denied.

Summary of the Argument

There is no justification for issuance of the writ in this matter. The primary issue petitioners raise—the existence of a private right of action concerning compliance with Consumer Product Safety Commission [hereinafter referred to as the "CPSC"] interpretive rules—was not decided by the lower court. Moreover, the basis for the petitioners' request—a difference of opinion between federal courts considering the issue—is misleading. Every circuit court to consider the question has decided that a private action does not exist.

In *Kelsey v. Muskin, Inc.*, 848 F.2d 39 (2d Cir. 1988), the lower court decided that the undisputed facts were fatal to the petitioners' claims whether or not the private action issue was decided in their favor. The Second Circuit decided that the cause of this incident was Donald Kelsey, not any conduct on respondents' part. While it is true that the Second Circuit did not evaluate the element of causation in a vacuum, it cannot be said that the analysis was, in any way, improper. Although petitioners intimate error, they point to no rule, case, or other authority that would counsel a different result.

Finally, even if this Court found a private action to exist and applied some new rule of causation to revivify petitioners' theory, several respondents would still be entitled to judgment as a matter of law because they admittedly were not directly connected to the product involved. This is another reason to deny the petition.

REASONS FOR DENYING THE WRIT

POINT I

The Second Circuit never reached the private action issue, but every circuit court considering the question has concluded that a private action does not exist.

Petitioners concede that the lower court never reached a decision concerning a private right of action under the CPSA. Brief for Petitioner at 13.[2] Indeed, the Second Circuit noted that "[a] report that [diving from the house deck railing] was dangerous . . . would . . . have disclosed only what Kelsey already knew or should have known. . . . The failure to report thus cannot be viewed as a cause of Kelsey's injuries." *Kelsey v. Muskin, Inc.*, 848 F.2d 39, 42 (2d Cir. 1988). The undisputed facts—that Donald Kelsey knew or should have known of the danger—permitted a decision on a different ground. The Second Circuit never reached the private action question, and the other circuits that have considered the issue have been less generous.

In fact, every circuit court addressing the question has concluded that there is no private right of action based on the failure to report allegedly unsafe products. *See Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988); *Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. 1988); *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986); *see also Copley v. Heil-Quaker Corp.*, No. 86-3360 (6th Cir. 1987) (LEXIS, Genfed Library, Courts file).

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[2] Sidestepping the private action issue, the Second Circuit noted, "[*w*]*e need not, however, decide these issues,* for even if they were resolved in favor of plaintiffs, we would be required to uphold dismissal of the complaint." *Kelsey v. Muskin, Inc.*, 848 F.2d 39, 42 (2d Cir. 1988) (emphasis added).

On this application, the petitioners attempt to create the illusion of a split among the circuits by pointing to some district court cases decided before any circuit court considered the issue. *See Hughes v. Segal Enterprises, Inc.*, 627 F. Supp. 1231 (W.D. Ark. 1986); *Martin v. International Dryer Corp.*, 637 F. Supp. 101 (E.D.N.C. 1986); *Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671 (N.D. Ind. 1985); *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288 (N.D.N.Y. 1983); *Payne v. A.O. Smith Corp.*, 578 F. Supp. 733 (S.D. Ohio 1983); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692 (D. Md. 1981); *see also Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985) *cert. den.*, 476 U.S. 1130 (1986); *but see Kahn v. Sears, Roebuck & Co.*, 607 F. Supp. 957 (N.D. Ga. 1985); *Morris v. Coleco Indus.*, 587 F. Supp. 8 (E.D. Va. 1984) (finding no cause of action).

The first circuit court to consider the question was the Eighth Circuit in *Drake v. Honeywell*, 797 F.2d 603 (8th Cir. 1986). The Eighth Circuit properly recognized the distinction between "interpretive" rules, those merely implementing the underlying legislation, and "substantive" rules, going beyond interpretive rules by creating additional duties that may be enforced as law.[3] Applying well-settled administrative law principles, the Eighth Circuit held that the CPSC's reporting rule was not a substantive rule, and therefore, did not give rise to a private right of action. 797 F.2d at 606-09.

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[3] In fact, the Eighth Circuit was also the first court to have, for its benefit, a law review article precisely on point. *See* Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 Minn. L. Rev. 955 (1985-1986). This article was written while *Drake* was pending on appeal to the Eighth Circuit and the reasoning contained therein—elaborating at length on the distinction between substantive and interpretive rules—was adopted by the Eighth Circuit.

The *Drake* analysis was subsequently adopted by every circuit court considering the question.[4] *Drake* was found so persuasive that one court reversed its earlier position within the same case. *Compare Zepik v. Ceeco Pool & Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986) *with Zepik v. Ceeco Pool and Supply, Inc.*, 118 F.R.D. 455 (N.D. Ind. 1987) *aff'd sub nom., Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988) (adopting *Drake*); *see also Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. Sept. 20, 1988); *Deslauriers v. Honda Motor Co., Ltd.*, No. 88-407 (W.D. Pa. June 24, 1988) (LEXIS, Genfed Library, Courts file); *Kukulka v. Holiday Cycle Sales, Inc.*, 680 F. Supp. 266 (E.D. Mich. Feb. 19, 1988). Four circuits are now in unanimous agreement that there is no private right of action.

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[4] Only one post-*Drake* case, from a district court, arguably disagrees with the analysis. *Mason v. Bernzomatic Corp.*, No. 87-7380, (E.D. Pa. July 6, 1988) (LEXIS, Genfed Library, Courts file). The decision in *Mason* is equivocal, however, concluding that "the court is inclined to hold that these rules do fall in the 'any other rule' category identified by the statute. . . . However, *the court shall reserve decision on this issue for a more final stage of these proceedings*, and plaintiff meanwhile may proceed as having properly stated a claim with regard to rules and regulations of the Commission under the Act." *Id.* (emphasis added). Even this case postponed making a final decision about the viability of a cause of action, and thus, cannot be considered contrary to *Drake*.

Contrary to the petitioners' assertion, these recent cases do not reflect a "growing number of inconsistent and conflicting decisions." Brief for Petitioner at 26. There is no split among the circuits and there is a general recognition that the pre-*Drake* cases were decided wrongly. Moreover, the Second Circuit never reached the issue. For these reasons alone, the petition should be denied.[5]

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[5] Even a case from the Minnesota Court of Appeals expresses skepticism about the soundness of the one pre-*Drake* Minnesota Supreme Court case supporting petitioners' view, *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985) *cert. den.*, 476 U.S. 1130 (1986). In *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688 (Minn. Ct. App. 1986), the court recognized the conflicting positions adopted in *Swenson* and *Drake*, but noted that as an intermediate appellate court, it was obliged to follow the Minnesota Supreme Court.

POINT II

Creating a federal law of causation would not alter the outcome of this case.

Citing various cases suggesting the virtue of uniformity, petitioners urge that if the Court creates a federal, common law of causation, then the CPSA claim could somehow become viable. Brief for Petitioner at 28-40. Absent from their analysis, however, is any explanation of how a federal law of causation would differ from traditional tort concepts and how such a newly contrived definition would alter the outcome of this case.

The causation problems presented by recognizing a private action were highlighted recently by the Seventh Circuit. *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988). The court observed that section 23(a) of the CPSA, 15 U.S.C. §2072(a) (1982), requires proof that an injury occurred "by reason of" a CPSC rule violation, and the "by reason of" language requires proof of causation. The *Zepik* court explained:

> [t]he CPSA does not elaborate on the meaning of 'by reason of,' but in the absence of any indication that Congress intended to depart from conventional notions of causation we think *the causal connection required here should be roughly equivalent to the causal connection required to establish common law tort liability.* . . . For our purposes, it is enough to observe that given the CPSA's structure and legislative history *no plausible federal standard could deviate so radically from established concepts of causation in tort*—including those prevailing under Indiana law—as to authorize suits under section 23 for reporting violations.

856 F.2d at 942 (emphasis added). The *Zepik* court, in other words, found the causation problems presented by petitioners' view sufficient to justify the conclusion that no private action existed. The *Kelsey* court, on the other hand, found the causation problems sufficient to justify the lower court's award of summary judgment. Absent from both cases—and more importantly, from petitioners' arguments—is how a federal standard would or could change the result or solve the problems identified by the Second and Seventh Circuits.[6]

Zepik strengthens the *Kelsey* court's conclusions by establishing that a federal law of causation would not assist the petitioners, and that the speculative nature of proving the causation element constitutes a separate basis for refusing to find a private right of action in the first place. Though petitioners would have this Court review *Kelsey*, and implicitly *Zepik*, they offer no alternative to the reasoning of either case. Petitioners simply argue that they should recover. This *ipse dixit* reasoning is no basis to grant certiorari.

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[6] Characterizing the process as speculative and attenuated, the Seventh Circuit noted that to establish "by reason of" causation, the plaintiff must show that the CPSC was deprived of information not already known, that the CPSC would have successfully countered the defect, and that the response would have been implemented in enough time and in such a manner as to prevent the injury. 856 F.2d at 942-43.

POINT III

Any claim against many of the respondents must fail because these parties have no connection to the incident.

The petitioners readily admit that they initially sued various defendants merely because these defendants were in the swimming pool business. Brief for Petitioner at 9 n.3. In other words, several defendants—including National Spa and Pool Institute—have no connection with the product involved in this accident. *Zepik v. Ceeco Pool and Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986) (CPSA creates no duty to report defects in other manufacturers' products).[7]

Application of the CPSA is expressly defined. The portions relied upon by the petitioners apply only to the "manufacturer ... distributor and retailer" of a consumer product. 15 U.S.C. §2064(b) (1982). These terms are defined by the CPSA and by the CPSC interpretive rules relied upon by the petitioners. *See* 15 U.S.C. §2052 (a)(4), (5) & (6) (1982); 16 C.F.R. §1115.3—1115.14 (1988).

The respondent, National Spa and Pool Institute [hereinafter referred to as "NSPI"], is the national trade association for the swimming pool, spa, and hot tub industry. The petitioners have not alleged that NSPI manufactured, distributed or sold the pool, but rather, have claimed the NSPI was an "alter ego" of the industry. Brief for Petitioner at 7-9 & n.3. None of

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[7] In fact, a reading of section 2064(b) and the definitions contained in the CPSA supports the conclusion that Congress intended to impose a duty to report only on the manufacturer, distributor, or retailer of the particular product involved, not every member of an entire industry. *Compare* 15 U.S.C. §2052(a)(4), (5) & (6) *with* 15 U.S.C. §2064(b) (1982).

these claims brings NSPI under the application of the CPSA. *Morris v. Coleco Indus.*, 587 F. Supp. 8, 10 (E.D. Va. 1984) (CPSA does not apply to NSPI because NSPI does not manufacture, distribute or sell consumer goods); *see Howard v. Poseidon Pools, Inc.*, 134 A.D.2d 926, 522 N.Y.S.2d 388 (N.Y. App. Div. 1987) *aff'd on other grounds*, _____ N.Y.2d _____, No. 224 (N.Y. Oct. 13, 1988) (NSPI owes no duty to personal injury plaintiff).

Thus, if this Court relies on the plain language of the CPSA—a suggestion, ironically, urged by the petitioners—the petition must be denied because, admittedly, several defendants have no connection to the product involved. Even if this Court granted certiorari and reversed the Second Circuit, the petitioners' claims would be fatally flawed. This is an additional reason for denying the writ.

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari must be denied by this Court.

Dated: Buffalo, New York
December 13, 1988

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